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NO. 83-630

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, TERM, 1983

EFREM BERNAL,

Petitioner,

V.

JOHN W. FAINTER, JR., Secretary of State
of the State of Texas,
JOE RIVERA, County Clerk for Cameron County, Texas,
and, SANTOS SALDANA, County Clerk
for Hidalgo County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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February 1984

QUESTION PRESENTED

May the State of Texas require United States citizenship for appointment to the Texas constitutional office of Notary Public?

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STATEMENT OF THE CASE

Margarita M. Vargas brought suit against the State of Texas challenging the statutory qualification that the office of notary public be held by United States citizens. At the time she initiated suit, Ms. Vargas was a resident alien, whose full-time employment as a secretary did not require her appointment as a notary public (Vargas Depos. at 12). During the course of these proceedings, Ms. Vargas became a citizen and the case became moot with respect to her.[1]

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[1]The records do not reflect that Ms. Vargas reapplied for the office of notary public after she became eligible.

Efrem Bernal was employed as a paralegal at the time he entered this lawsuit. His job did not require his appointment as a notary public (Bernal Depos. at 8). Mr. Bernal is a resident alien; he is not a citizen of the United States because he "just had not seriously thought about it." (Bernal Depos. at 37). This case is not brought as a class action.

SUMMARY OF ARGUMENT

Petitioner, a resident alien, seeks appointment to the Texas constitutional office of notary public. Texas has excluded him from appointment to this public office because

it has determined that United States citizenship is a necessary requirement for holding the office.

The power to prescribe the qualifications for appointment to state office has been specifically reserved to the States by the United States Constitution. Texas has reasonably exercised this power by requiring citizenship and state residency of its notaries public to effectuate the state's legitimate interest in their continued accountability. The burden on Petitioner is minimal: he has been temporarily excluded from a public office which

affects neither his livelihood nor his basic existence in the community.

ARGUMENT

The State of Texas May Legitimately Require Citizenship For Appointment To the Texas Constitutional Office of Notary Public.

I. THE STATE OF TEXAS MAY PRESCRIBE THE QUALIFICATIONS FOR HOLDING THE PUBLIC OFFICE OF NOTARY PUBLIC, AS LONG AS THEY ARE RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

It is within the State's constitutional prerogative to prescribe the qualifications of its officers. Sugarman v. Dougall, 413 U.S. 634 (1973).

This authority emanates from those powers specifically reserved to the States by the Tenth Amendment to the United States Constitution to establish and operate their own governments. Id. at 648. The qualifications for public office may include citizenship "where citizenship bears some rational relationship to the special demands of the particular position." Id. at 647 (citation omitted).

A. The Office of Notary Public is a Public Office Under Texas Law

Constitutional status for the office of notary public dates from the Constitution of

1845, art. V, §19, which provided for the appointment by the governor with the advice and consent of the senate of not more than six notaries for each county. At the time of the 1875 Constitutional Convention, the constitutional provision for notaries public in art. IV, §26 was enacted to read as follows:

> Sec. 26. The Governor, by and with the advice and consent of two-thirds of the Senate, shall appoint a convenient number of Notaries Public for each county, who shall perform such duties as now are or may be prescribed by law.

During the 1875 debates, there was a proposal to strike Section 26 on the grounds that justices

of the peace acting as notaries would be sufficient. [See, McKay, Debates in the Texas Constitutional Convention of 1875, 166-67 (1930)]. Although that proposal was defeated, art. V, §19 of the 1876 Constitution continued the practice of permitting justices of the peace to be ex officio notaries public.

In 1940, the constitutional provision regarding the procedure for the appointment of notaries public was amended as follows:

> Section 26. (a) The Secretary of State shall appoint a convenient number of Notaries Public for each county who shall perform such duties as now are or may

be prescribed by law. The qualifications of Notaries Public shall be prescribed by law.
(b) Nothing herein shall affect the terms of office of Notaries Public who have qualified for the present term prior to the taking effect of this amendment.
(c) Should the Legislature enact an enabling law hereto in anticipation of the adoption of this amendment, such law shall not be invalid by reason of its anticipatory character.

Shortly after the constitutional amendment allowing for appointment of notaries by the Secretary of State, the Texas Legislature enacted statutory qualifications for notaries, including state residency and citizenship.

Texas is one of only six states to give the office of notary public constitutional

status. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis, 361-62 (1977); see also, Taggart v. Mandel, 391 F.Supp. 732, 738 (D. Md. 1975) (constitutional office of notary public is a public office). There is no question that a notary public is a public officer under the Texas Constitution:

> A notary public is an officer who is given a commission of authority to administer oaths and take acknowledgements to documents of any kind requiring an oath. It is his duty to attest and certify by his hand and seal to the genuineness of documents so that they will be rendered available as

evidence of the facts contained therein. He thus imparts authenticity to documents.

The office is an ancient one originating in Roman jurisprudence and known to most Christian nations. It was recognized in England long before the Norman conquest.

In Texas notaries public were authorized to authenticate instruments during the days of Spanish and Mexican control. An act passed in 1837 by the Republic of Texas authorized the appointment of notaries. The Constitution of 1845 authorized the appointment of a convenient number of notaries public not exceeding six for each county, who were to perform duties prescribed by law and such other duties as the legislature should from time to time prescribe.

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Tex. Const. art. IV, §26, interp. commentary (Vernon 1955).[2]

Recognition by the State of Texas of notaries public as public officeholders distinguishes this case from In re Griffiths, 413 U.S. 717 (1973), where the Court noted that "the Connecticut Supreme Court. . . recognized that a lawyer is not an officer in the ordinary sense." Id. at 728. Texas's specific designation of notaries as constitutional officeholders

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[2]See also, Lawyers Surety Corporation v. Gulf Coast Investment Corporation, 410 S.W.2d 654, 657 (Tex. Civ. App.--Tyler), writ ref'd n.r.e. per curiam, 416 S.W.2d 779 (Tex. 1967) ("A notary is a public officer").

also sets this case apart from Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979); and Cabell v. Chavez-Salido, 454 U.S. 432 (1982). In each of those cases, the states did not claim that the jobs represented "public offices" in the traditional sense. Instead, the states urged that the jobs were functionally so important to the "concept of democratic self-government" that the states should have the right to prescribe their qualifications, subject to limited judicial review. This Court agreed.

Here, the State of Texas has historically and consistently exercised its

constitutional prerogative to include the office of notary public firmly within its definition of its political community. Texas has the right to do so:

> Definition of the important sovereign functions of the political community is necessarily the primary responsibility of the representative branches of government, subject to limited judicial review.

Cabell, supra, at 445; see also, Clements v. Fashing, 452 U.S. 404 (1982) (Stevens, J., concurring) (state's legitimate interest in structuring its own form of government).

B. The Duties of the Office of Notary Public In Texas are Sufficiently Important to Qualify It as a Public Office

Absent a designation by the state that a particular position is a public office, the Court "will look to the importance of the function as a factor giving substance to the concept of democratic self-government" in determining whether a position holds "public office" status. Cabell, supra, at 441, n. 7. Under Texas law, notaries public operate in a capacity similar to that of a county clerk.

> Notaries Public shall have the same authority to take acknowledgments or proofs of written instruments, protest instruments permitted by law to be protested, administer oaths, and take depositions, as is now or may hereafter be conferred by law upon County Clerks, and provided that all Notaries Public shall print or stamp their names and the expiration dates of their commissions under their signatures on all such written instruments, protest instruments, oaths, or depositions; provided further that failure to so print or stamp their names and expiration dates of their commissions under their signatures shall not invalidate such acknowledgment.

Tex. Rev. Civ. Stat. Ann. art. 5954 (Vernon 1983) (emphasis added). They are required to keep public records:

> . . . . The book herein required to be kept, and the statements herein required to be entered shall be an original public record, open to inspection by any citizen at all reasonable times. Each notary public shall give a certified copy of any record in his office to any person applying therefor on payment of all fees thereon.

Tex. Rev. Civ. Stat. Ann. art. 5955 (Vernon 1983); and to provide a seal of office:

> Each notary public shall provide a seal of office whereon shall be engraved in the center a star of five points, and the words, "Notary Public, State of Texas," around the margin and he shall authenticate all his official acts therewith. The use of a seal with the name of a county, when used by a qualified notary public, will not invalidate the acknowledgment.

Tex. Rev. Civ. Stat. Ann. art. 5960 (Vernon 1983) (emphasis added).

One of the notary's most important functions is the acknowledgment of written instruments. Tex. Rev. Civ. Stat. Ann. art. 6602 (Vernon 1983) provides that "the acknowledgment or proof of an instrument of writing for record may be made within this state before: a. A Clerk of the District Court. b. A Judge or Clerk of the County Court. c. A Notary Public." Thus, a notary public is <u>one of only three officers</u> entitled to take these acknowledgments or proofs of written instruments;

upon the placing of the notary's seal of office, the acknowledged instrument becomes recordable.

Notaries are also authorized to administer oaths. This power of administering oaths is significant in numerous legal transactions, particularly in probate, evidence, suits involving title to real estate, and suits seeking a declaration of heirship. For example, the Texas Probate Code, delineating "Requisities of a Will," provides as follows:

> . . . . Such a will or testament may, at the time of its execution or at any subsequent date during the lifetime of the testator and the witnesses, be made self-proved, and the testimony of the witnesses in the probate thereof may be made unnecessary, by the affidavits of the testator and the attesting witnesses, made before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of this State. . . . The affidavits shall be evidenced by a certificate, with official seal affixed, of such officer attached or annexed to such will or testament in form and contents substantially as follows: . . . .

Tex. Prob. Code Ann. §59 (Vernon 1983) (emphasis added).

Section 84 of the Probate Code provides that if a will is

self-proved as provided above, "no further proof of its execution with the formalities and solemnities . . . shall be necessary."

The only similarity between notaries and court reporters is that they are both authorized to take depositions. The powers of court reporters are statutorily created and narrowly confined.

> All official District Court reporters are authorized to take depositions of witnesses, and to receive, execute and return commissions, administer oaths and affidavits, in connection with such depositions, and make a certificate of fact, and do all other things necessary in the taking of such depositions in accordance with existing laws.

Tex. Rev. Civ. Stat. Ann. art. 2324a (emphasis added). Court reporters may only administer an oath in connection with a deposition; they do not have the authority to authenticate documents. Nor are notaries similarly situated to the Secretary of State. The Secretary of State is appointed by the governor with the advice and consent of the Senate. Tex. Const. art. IV, §21. The same gubernatorial appointment process was in effect for notaries prior to 1940 and prior to the enactment of the statutory qualification of citizenship and residency. The Texas

Legislature has uniformly considered that appointment by the governor with advice and consent of the Senate sufficiently guarantees accountability that separate requirements of citizenship and residency are not necessary.[3]

In contrast to court reporters and the Secretary of State, the constitutional office of notary public has assumed duties parallel to the duties of the constitutional offices of the county clerk and the

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[3]Nor are the duties of a notary similar to those of the Secretary of State. See, Ambach, supra, at 81, n. 15.

justice of the peace. All three officeholders may administer oaths, Tex. Rev. Civ. Stat. Ann. art. 5954 (Vernon 1983); Tex. Rev. Civ. Stat. Ann. art. 1935 (Vernon 1964); Tex. Rev. Civ. Stat. Ann. art. 2376 (Vernon 1983), authenticate documents, Tex. Rev. Civ. Stat. Ann. art. 6602 (Vernon 1983), and take depositions, Tex. Rev. Civ. Stat. Ann. art. 5954 (Vernon 1983); Tex. Rev. Civ. Stat. Ann. art. 1935 (Vernon 1964); Tex. Rev. Civ. Stat. Ann. art. 2376 (Vernon 1983). Citizenship is a requirement for all three public offices. Tex. Rev. Civ. Stat. Ann.

art. 5949 and Tex. Elec. Code Ann. art. 1.05 (Vernon 1983).

II. THE REQUIREMENT OF CITIZENSHIP FOR NOTARIES PUBLIC IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

A. The State of Texas Has a Legitimate Interest in the Continuing Accountability of Its Notaries Public

Since 1945, following the constitutional amendment providing for appointment of notaries by the Secretary of State, Texas has required that notaries public be residents of the state and citizens of the United States. These two requirements reflect the State's legitimate concern that notaries be reasonably

familiar with state law and institutions. Ambach, supra, at 80, n. 14; Sugarman, supra, at 660 (Rehnquist, J., dissenting). The requirements also reflect the State's recognition that notaries may be called upon years later to testify to the acts they have performed. See, Pollard v. State of Texas, 484 S.W.2d 387 (Tex. Civ. App.--Waco 1972, writ ref'd n.r.e.) (testifying as to notarizing deed eleven years earlier); Hale v. Hays, 441 S.W.2d 275 (Tex. Civ. App.--El Paso 1969, no writ); and Gomez v. Riddle, 334 S.W.2d 197

(Tex. Civ. App.--San Antonio 1960, no writ). The Texas Legislature has legitimately assumed that notaries who are citizens are as a practical matter more likely to be available to testify in the future. See, Nyquist v. Mauclet, 432 U.S. 1, 22 (1977) (Rehnquist, J., dissenting) (easier to collect repayment of loans from citizens than from aliens). As a matter of law, citizens have a duty to testify.

> It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.

Blackmer v. United States, 284 U.S. 421 (1932). Even if citizens and non-citizens were equally likely to leave the State, only the citizen has the on-going duty to return to testify should the need arise.

The State of Texas's requirement that notaries be residents and citizens is a rational attempt by the state to insure continuing accountability of its notaries. Texas's distinction between citizens and non-citizens does not violate equal protection even if the State could have selected another means of achieving the desired ends. Massachusetts Bd. of Retirement v. Murgia, 427 U.S.

307, 316 (1976); Matthews v. Diaz, 426 U.S. 67, 68 (1976); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 51 (1973).

B. The Requirement of Citizenship for the Office of Notary Public Does not Place an Onerous Burden on Petitioner

In testing the validity of state statutes under the Equal Protection Clause, this Court has often made inquiry into the nature of the fundamental personal rights endangered by the classification involved. Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 173 (1972). Here, Petitioner testified that, although eligible for citizenship, in his

twenty-three years in this country he has failed to apply. Therefore, his exclusion from the office of notary public is merely a temporary one, pending his becoming a United States citizen. Ambach, supra, at 69; Sugarman, supra, at 650 (Rehnquist, J., dissenting). Furthermore, Petitioner's ability to seek a livelihood or to "exist in the community" has not been threatened in anyway by the classification. In re Griffiths, supra, at 722; Foley, supra, at 295. In fact, Petitioner characterized his loss as one of mere inconvenience: "[I]t is very hard and inconvenient to get one of the other paralegals to go out with

me to just get an affidavit or statement notarized." (Bernal Depos. at 8).

The temporary inconvenience that the State's classification has caused Petitioner does not outweigh the State's legitimate interest in insuring the on-going accountability of its notaries. The distinction drawn between citizens and non-citizens by the State of Texas promotes a legitimate state interest without depriving Petitioner of his ability to exist in the community.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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